IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 762 OF 1990

Mohamed Nabi Yarmohammed Shaikh ..Appellant
(Org.Accd.No.4)

Vs.

The State of Maharashtra ..Respondent

Mr.A.H. Ponda with Mrs.F.H. Ponda for the appellant.
Mr.A.S. Shitole, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : July 12, 2007.

ORAL JUDGMENT:

1. This appeal arises from the order of conviction and sentence passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case no. 732 of 1984 on 31/10/1990. By the said order, the appellant-accused no.4 has been convicted for the offences punishable under Section 395 and Section 397 read with Section 395 of IPC and sentenced to suffer RI for seven years. While admitting the appeal on 17/12/1990 the bail granted to the appellant during the trial was continued and, therefore, while this appeal has been pending, the appellant continued on bail all along.

2. As per the prosecution the accused persons i.e. Manohar @ Manya Ramchandra Shinde, Rakesh Ramswarup Sharma, Pramod Ramnath Malhotra and Mohammed Nabi Yarmohammed Shaikh (present appellant) along with two absconding accused i.e. Mohammed Mussa Gulam Hussain Shaikh and Juberuddin Sartajuddin Munshi and one deceased accused Alan Phurtun Misquitta had on 3/5/1981 at about 10 p.m. at Kuality Restaurant committed dacoity at the threats of the deadly weapons like sword etc. and collected cash, ornaments, wrist watches collectively valued at Rs.39,650/-. The said Kuality Restaurant is located near Band Box, Dr. Anil Besant Road, Worli, Bombay 400 018 and at the relevant time it had some customers who were either enjoying their meals or snacks. Amongst such customers were, Chandrakant Ganesh Limaye (PW 1), Dr. Anant Nandkumar Patkar (PW 2), Ramesh Kantilal Shah (PW 3), Sukhadeo Gumanirao Thakur (PW 4), Chetan Hasmukhalal Bhagat (PW 5) and the accused entered the Restaurant, some of them remained near the entrance door and the others came inside the Restaurant and rushed to different places/tables therein. One of them hit the sword on the table and uttered the threats to the customers

there saying, "koyi Jagase Hilna Nahi", "Kimti Chije Nikalo". After sometimes one of the dacoits started collecting valuables from the customers and one was standing near the entrance door and he asked the wife of PW 1 to take out her Mangalsutra. While she was taking out her Mangalsutra, the dacoit pulled up the same and by this time other dacoits had collected valuables from other customers in the Restaurant and all of them fled. The information of this dacoity was given on telephone to Worli Police Station at about 10 p.m. PSI Sawant who was officer in-charge of the police station transmitted the message about the dacoity and, therefore, Police Inspector Shri Sankpal and SI Sawant went to the Kuality Restaurant. They saw all the customers in the Restaurant were scared and they met the Manager of the Restaurant Mr. Bhardwaj. He claimed to have lodged complaint with the police on the same day at about 10 p.m. PW 12 Krishna Dhondiba Anpadh took over the investigation and on 13/5/1981 arrested accused Rakesh Sharma, on 22/5/1981 he arrested accused Pramod Malhotra and accused Manohar Shinde, on 3/6/1981 he arrested accused Alan Misquitta. At the instance of accused Misquitta on 3/6/1981 the I.O. recovered one

Mangalsutra from the shop of one Sukhraj Bhalchandra Jain on Tejpal Road, Vile Parle under a panchanama Exh.58. On 4/6/1981 accused Mohd. Nabi Yarmohammed Shaikh (present appellant) was arrested and on 8/6/1981 accused Juberuddin Sattaruddin came to be arrested from Bandra Govt. Colony and the remaining investigation was proceeded, including the T.I. parade of these arrested accused. On 10/6/1981 accused Mohd. Musa Gulam was arrested from Khar. It appears that on 10/6/1981 while in custody accused Misquitta committed suicide. The accused while in custody made some disclosures of having handed over some of the articles collected in the dacoity and, therefore, memorandum was drawn and some articles were recovered, more particularly the articles were recovered from PW 7 - Audhot Laxman Parab at the instance of the present appellant and PW 6 - Vilas Sadashiv Kugaonkar was a panch witness for the same. On completion of the investigation, charge-sheet was filed against only four accused and out of the remaining, one was dead and two were shown as absconding.

3. The learned Judge of the trial court, on

appreciating the evidence adduced before him by the prosecution, recorded a finding that prosecution was not able to prove any of the offence against accused nos.1 to 3. The appellant, as noted earlier, along with the missing accused is guilty of an offence punishable under Section 395 and Section 397 read with Section 395 of IPC. The picture that emerges from the impugned order of conviction and sentence now is that one accused has been convicted and sentenced, one died and two are absconding. Section 391 of IPC states that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity". As per Section 390 of IPC, in all robbery there is either theft or extortion and the term "robbery" is independently defined. Section 392 of IPC prescribes punishment for robbery which is RI for a term which may extend to ten years and fine and for the offence of attempt to commit robbery within the meaning of Section 393 the punishment prescribes is RI for a term which may extend to seven years and

fine. Therefore, the foremost question that is required to be decided is, whether the conviction of the appellant under Section 395 and Section 397 read with Section 395 of IPC is sustainable.

4. When the accused were put on trial, they were in all four, two were absconding and one was dead and, therefore, the trial for the offence under Section 395 is initiated. The trial court has acquitted three of the accused and thus the remaining persons allegedly involved in the offence would remain at four and one of them is dead subsequently. It is, therefore, fairly conceded that the offence of dacoity punishable under Section 395 of IPC would not survive, and the State has not filed an appeal against the acquittal of accused Nos.1 to 3.

5. As per the prosecution its star witnesses were PW 1 - Chandrakant Limaye, PW 2 - Dr.Anant Patkar, PW 3 - Ramesh Shah and PW 5 - Chetan Bhagat. PW 4 - Sukhdeo Thakur was a panch witness. The trial court in the impugned order of conviction and sentence has observed that except PW 1 - Chandrakant Limaye, no other prosecution witnesses (PWs 2, 3 and 5) have

identified any of the accused persons in the court and, therefore, the identification done in the T.I. parade conducted by PW 11 - Mahesh Mulye, the SEM, loses its relevance. It is well settled that the identification made before the court by the witnesses is the substantial evidence. PW 1 - Chandrakant Limaye has identified accused nos.1 and 4 in the court and accused no.1 has been acquitted. Therefore, to decide this appeal, it is necessary to consider the testimony of PW 1 - Chandrakant Limaye, who identified the present appellant - accused no.4. Similarly, the prosecution has connected the involvement of the accused no.4 in the offence on the basis of the recovery made from PW 7 Audhot Laxman Parab in the presence of PW 6 - Vilas Kugaonkar, the panch witness.

6. PW 1 stated that while he was sitting in the Quality Restaurant with his wife and when they had started taking food, around 9.45 p.m. 5 to 6 persons entered the Restaurant and they were armed with swords and other weapons. Initially, he thought that they were sportsmen but when one of them hit the sword on the table which was occupied by some other customers by saying "Koyi Jagase Hilna Nahi", "Kimti Chije

Nikalo" he realised the situation was serious. One other person was standing close to his table and was holding the sword, whereas the third person started collecting valuables from the customers. The person holding the sword and standing near his table, pulled the Mangalsutra from the neck of his wife and also slapped him on his shoulder. The person who did this was a tall person, well built, having round face with sallow complexion and was wearing full trouser and shirt. The police arrived in 10 minutes time and his statement was recorded at the police station where he was taken by the police. He further stated that the culprit who had slapped him and pulled the Mangalsutra of his wife was not before the court. As per him, accused no.1 was the person who had hit the sword on the table and uttered the threats. Whereas accused no.4 was moving from table to table collecting valuables from the customers. He also stated that on 6/6/1981 when he was called in the office of DCB CID he was shown by PSI Anpadh PW 12 some ornaments and wrist watches. He and his wife identified the Mangalsutra which was robed from the person of his wife (Article No.1). In his cross-examination he admitted that the incident lasted for about 3 to 5

minutes and out of the five-six culprits two had rushed at the cash counter of the Manager and there were three rows of tables in the Restaurant. At the relevant time there might be about 20 customers in the Restaurant. He and his wife were facing the entrance door and were on the first table from the entrance. He also admitted that amongst all the offenders his attention was on the culprit who had pulled the Mangalsutra from his wife and another person who had hit sword on the table. In his cross-examination conducted on behalf of the accused nos.1 and 4, he admitted that the number of persons involved in the incident would be 6 to 8 or at least 7 persons. He also admitted that the person who branded the sword was the person who shouted "Koyi Jagase Hilna Nahi", but could not say why such a statement did not find place in his statement recorded by the police. The sketch at Exh.X-1 indicates the sitting arrangement in the Restaurant, the direction of the door as well as the Manager’s counter. The witness admitted that he and his wife were sitting on the very first table in front of the entrance door and there was no one else. He also admitted that he and his wife were facing the entrance door. Having regards to this description, it

will have to be presumed that remaining two rows of the tables were on the left and right sides of this witness and his wife. He further admitted that the accused no.4 was moving around, collecting valuables, money and other articles from the customers present on other tables. The learned Judge of the trial court, on consideration of the scene of the Restaurant, the dim lights, did not find it safe to rely upon the testimony of PW 1 in the identification of either accused no.1 or accused no.4. The trial court observed, "It is seen from the prosecution evidence that some of the dacoits were moving from here and there with swords. Some of them were threatening the customers. One of them banged the sword on the table. The lights in the restaurant were dim and duration of the incident was 3 to 5 minutes. It is, therefore, impossible to believe that the features of any of the dacoits could have been impressed so much on the mind of PW 1 and others that it was possible for them to identify any of the dacoits later on. I am not therefore, able to hold that the evidence of prosecution on the point of identification can be believed". It is also pertinent to note that the incident had taken place on 3/5/1981 and the witnesses

had entered the witness box about 9 years later.

7. The trial court while accepting the prosecution case against accused no.4 has relied upon the evidence of PW 5, PW 6 and PW 7. PW 6 Vilas Kugaonkar has proved the memorandum drawn at Exh.42 in the Byculla Police Station regarding the statement made by accused no.4 that he had handed over some articles to the person staying in the Maharashtra Housing Colony at Bandra. PW 6, PSI Krishna Anpadh (PW 12) along with accused no.4, therefore, proceeded in a police jeep to the MHADA colony at Bandra. As per PW 6, accused no.4 took the party to a multi storeyed building and on the third floor he knocked the door of a room and somebody opened the door from inside. The accused told the said person that he had come with the police and should hand over the writ watches and gold ornaments tot he police which he had kept in his custody. The person who opened the door was identified by PW 6 in the court by pointing his finger towards PW 7. He further stated that when the police had asked his name during the visit along with the accused no.4, he had disclosed his name as Audhot

Laxman Parab. He further stated that PW 7 produced two wrist watches and one pendent and handed over these articles to the police. The panchanama to the said effect was drawn at Exh.43. PW 5 - Chetan Bhagat had stated in his examination-in-chief that he was one of the persons present in the Quality Restaurant when the incident had taken place and at that time he was wearing wrist watch of Citizen Cartaz with stainless steel. It was a new wrist watch purchased few months back. He had given the description of the wrist watch to the police. He also admitted that having looked at all the persons in the court it was difficult to identify any of them as the offenders. He also admitted that he could not identify any of the accused in the T.I. parade held on 14/5/1990. He identified before the court Article No.3 out of Article Nos.2,3,6 and 7 and the same was his wrist watch. This Article No.3 was recovered vide panchanama at Exh.43.

8. Now coming to the depositions of PW 7, he stated in his examination-in-chief and reiterated in his cross-examination that he could not identify any of the accused persons who were present in the court hall. However, he admitted that Article Nos.2,3 and 4

were the same articles which were recovered from his possession by the police vide the panchanama at Exh.43, but did not remember that how long these articles were in his possession. He also admitted that his statement was recorded by the police on 8/6/1981 and on that day these articles were recovered from him. When the Special P.P. with the permission of the court specifically asked a question to this witness, he replied that he did not remember if the police had shown him the accused who had given his name as Mohd. Nabi. He subsequently stated that he knew the said accused 10 years back. In his cross-examination, he stated that, "It is correct that I do not know any of the four accused persons, I do not remember if the person who had given me the wrist watches and the pendant is not amongst the four accused persons. In connection with this case I had come to the court today. It is correct that in my life I am seeing the accused persons for the first time today".

. It is pertinent to note that this witness was not declared hostile by the Spl. P.P. inspite of the fact that even in the examination-in-chief he has

stated that he could not identify any of the accused persons and he was seeing them for the first time. It was not brought out from the testimony of this witness that it was accused no.4 alone or some other accused who had handed over article nos.2,3 and 4 i.e. two wrist watches and one gold pendant at any time to keep in his custody. The statement made by this witness in his cross-examination, " I had also stated to the police that the accused had given me two wrist watches and one paper packet contained one gold pendant fitted with 8 white coloured diamonds and told me to keep the same with me", cannot be termed to be a substantive evidence to support the case of the prosecution against accused no.4. It is, therefore, clear that the recovery of the articles from PW 7 (Article Nos.2 to 4) could not be established by the prosecution that it was linked with accused no.4. Unless the prosecution proved beyond doubt that it was accused no.4 who had handed over these three articles to PW 7, it would not be safe to accept the reasoning set out by the trial court implicating the accused no.4 in the incident. This will be a very weak evidence and, therefore, it would be unsafe to rely upon the same. There is no other evidence which has been considered

by the trial court holding the accused no.4 guilty and, therefore, the order of conviction recorded by the trial court is unsustainable.

9. In the premises, this appeal succeeds and the same is hereby allowed. The impugned order of conviction and sentence dated 31/10/1990 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No.732 of 1984 is hereby quashed and set aside and the appellant-accused no.4 stands acquitted. The bail bonds of the appellant stand cancelled.

(B.H. Marlapalle,J.)